to the government. Under s 103(1) regarding payment of tax, the section reads:

Subject to this section, tax payable under an assessment for a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.

It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that the moment the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not.'

We were satisfied that in this case there are no triable issues and therefore dismissed the taxpayer's appeal with costs.

Though *Chong Woo Yit*'s case[4] was on an O 14 application, the principle stated above, in my opinion, equally applies to an application for setting aside default judgment under O 13 r 8.

The supplementary affidavit of the defendant alluded to the real property gains tax though this was not dealt with by counsel for the defendant in his submission nor averred in the plaintiff's statement of claim. However, for the purpose of this application, I find the point raised in the supplementary affidavit immaterial and of no significance because, assuming that the Real Property Gains Tax Act 1976 applies, this Act contains similar or substantially similar provisions as those in s 103(1) and (4) and s 106(1) and (3) of the Income Tax Act 1967. (See s 21(1) and (4) and s 23(1) and (3) of the Real Property Gains Tax Act 1976.) The result remains the same, ie the court will not entertain any plea that the amount of tax sought to be recovered is excessive, or incorrectly assessed or increased.

As regards the second ground of the defendant that his disputes over the assessments were not referred to the special commissioners, counsel for the defendant conceded that the letters (exhs 'SSH 2', 'SSH 3' and 'SSH 4' annexed to the defendant's affidavit made on 25 October 1988) were given out of time, ie after the 30 days required under s 99(1) of the Income Tax Act (s 18(1) of the Real Property Gains Tax Act 1976). There is no evidence nor has it been submitted that extension of time for giving notice of appeal had been applied for and granted. Also, the letters dealt with taxes for years of assessment 1975 and 1978 only.

For the plaintiff, it is not clear whether the complaint of the defendant is pending appeal. In any event, by virtue of s 103(1) and (4) and s 106(1) and (3) of the Income Tax Act 1967, the taxes involved are due and payable and recoverable as a debt due to the government by civil proceedings in which the plea of excessive or incorrect assessment could not be entertained. (For the equivalent of these provisions in the Real Property Gains Tax Act 1976, see above).

For the above reasons, this application is dismissed with costs to the plaintiff. In the absence of an agreement, such costs may be taxed.

Application dismissed.

Solicitors: *Wong & Co.*

Reported by *Mathavan Devadas*

United Engineers (Malaysia) Bhd v Yeong Sinn Hoong

HIGH COURT (KUALA LUMPUR) — SUIT NO C1942 OF 1982
ZAKARIA YATIM J
27 JUNE 1989

Bailment — Breach — Loss of goods entrusted to bailee's care — Burden of proof — Contracts Act 1950, ss 104 & 105

Civil Procedure — Parties — Party to be sued — Whether sole proprietor or company to be made defendant

By an oral agreement between the plaintiff and the defendant, it was agreed that the plaintiff would from time to time deposit its goods at the defendant's warehouse. On 9 November 1981, the plaintiff delivered to the defendant 21 cases of Condor earth leakage circuit breakers ('the said goods') to be safely kept and taken care of by the defendant and to be returned to the plaintiff on demand. The said goods were delivered by the plaintiff's forwarding agent to the defendant with a delivery note. The defendant billed the plaintiff monthly for the storage of the said goods and the plaintiff paid the defendant on the due date. The plaintiff wrote two letters to the defendant informing the defendant that the plaintiff's goods must not be allowed to leave the defendant's warehouse without the authorized signature of either of the officers of the plaintiff. Their specimen signatures were contained in the letters. The plaintiff alleged that on 17 March 1982 the defendant, without the lawful authority of the plaintiff, unlawfully released 20 cases of the said goods from the defendant's custody to persons unknown. The said goods were released by the defendant to persons unknown on the basis of a letter purportedly written by the plaintiff on the plaintiff's letterhead.

The defendant said that when the said letter was received, the said goods were released. The plaintiff did not receive the said goods. The plaintiff thus commenced this suit, claiming from the defendant a sum of $116,680 together with interest and costs for the loss of 20 cases of the said goods.

Held, giving judgment to the plaintiff:

(1) On the issue of whether the sole proprietor or the company should be the party named as defendant, Syarikat Tropical Baggage was a sole proprietorship. The defendant was carrying on business in the name or style of Syarikat Tropical Baggage and thus the plaintiff could sue him in that name or style as if it were the name of the firm. It was proper for the plaintiff to sue the defendant in his own name and to add below his name within brackets (trading as, 't/a' Syarikat Tropical Baggage).

(2) Under ss 104 and 105 of the Contracts Act 1952, the loss of the said goods entrusted to the defendant is prima facie

evidence of negligence. It is for the defendant to prove that the loss of the said goods was not caused by any fault of his or any of his servants. The onus was also upon the defendant to prove that the loss of the said goods was not caused by the negligence or misconduct of his employees in the course of their employment.

(3) The defendant or his employee failed to take as much care of the goods bailed to him as a man of ordinary prudence would take of his own goods. This was a clear case of negligence on the part of the defendant as the defendant released the said goods without complying with the conditions laid down in the said letters.

(4) The defendant was, accordingly, responsible for the loss of the said goods and liable to make compensation to the plaintiff for such loss.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-382-89.]

Cases referred to

1 *Port Swettenham Authority* v *TW Wu & Co (M) Sdn Bhd* [1978] 2 MLJ 137 (folld)

Legislation referred to

Companies Act 1965 ss 16(7), 22
Contracts Act 1952 ss 104, 105
Partnership Act 1961 s 3(1)

S Asiriah (Miss) for the plaintiff.
Bhagwan Singh for the defendant

Cur Adv Vult

Zakaria Yatim J: In this suit, the plaintiff is claiming from the defendant a sum of $166,680 together with interest and costs for the loss of 20 cases of Condor earth leakage circuit breakers ('the said goods') which were kept in the defendant's warehouse.

By an oral agreement between the plaintiff and the defendant, it was agreed that the plaintiff would from time to time deposit its goods at the defendant's warehouse. On 9 November 1981, the plaintiff delivered to the defendant 21 cases of the said goods to be safely kept and taken care of by the defendant and to be returned by the defendant to the plaintiff on demand. The said goods were delivered by the plaintiff's forwarding agent to the defendant with a delivery note (P2). It was not in dispute that the said goods were received by the defendant. The rental for the storage of the said goods was $0.20 per cubic foot per month. The defendant billed the plaintiff monthly for the storage of the said goods and the plaintiff paid the defendant on the due date. It was not in dispute that the plaintiff wrote two letters to the defendant informing the defendant that the plaintiff's goods must not be allowed to leave the defendant's warehouse without the authorized signature of either Mr Ho Cheng Hong, Mr Kenny Lim or Mr Yee Cheon Seng who were officers of the plaintiff. Their specimen signatures were contained in the letters.

One authorized signature would be sufficient for the release of the plaintiff's goods from the defendant's warehouse as shown in a despatch advice dated 3 March 1982 issued by the plaintiff to the defendant for the release of six cases of Conda 40 amps 2 pols ELCB (exh P6). When the goods in P6 were released, the defendant prepared a delivery order addressed to the plaintiff with the description of the goods and the reference number of the despatch advice, No 0115 (P6), and the registration number of the vehicle. The delivery order would be signed by the person who received the goods with his NRIC number written below the signature.

The plaintiff alleged in the statement of claim that on 17 March 1982, the defendant, without the lawful authority of the plaintiff, unlawfully released 20 cases of the said goods from the defendant's custody to persons unknown. The said goods were released by the defendant to persons unknown on the basis of a letter purportedly written by the plaintiff on the plaintiff's letterhead (P8).

The defendant, in his evidence, said that when P8 was received the said goods were released. Before the goods were released, a delivery order was purportedly signed by the person who received the said goods. The plaintiff did not receive the said goods. On 30 March 1982, the plaintiff through its administrative manager, Mr Ho Cheng Hong, lodged a police report at the Sentul Police Station.

At the close of the case for the defence, Mr Bhagwan Singh, counsel for the defendant, submitted that Mr Yeong Sinn Hoong (DW1) was not the right person to be sued in this action. According to him, Syarikat Tropical Baggage was a company and should be made the defendant. Miss Asiriah, counsel for the plaintiff, submitted that DW1 was the sole proprietor of Syarikat Tropical Baggage. She added that Syarikat Tropical Baggage was not a company. In the statement of claim, the plaintiff had not stated the status of the parties in the present action. It is necessary therefore to examine the evidence in order to ascertain whether the plaintiff was suing the right party.

In his evidence, DW1 said he started work as an employee of Malaysian Baggage. Subsequently he worked for Oriental Packing and Shipping. In 1979 he started his own business, Syarikat Tropical Baggage. He said:

> I started Tropical Baggage in 1979. Officer in charge of warehouse — John Terrenge Gonzalez. He was my senior officer in Malaysia Baggage. When I commenced Tropical Baggage, I appointed him to work with me. My work was as marketing officer to secure business. John Gonzalez in charge of warehouse. I am shipping manager. I am not director. At the time of incident we have four staff, ie John and three others...

It is clear from DW1's evidence that he was the sole owner of the business. He employed four persons including John Gonzalez. From DW1's evidence, it cannot be said that Syarikat Tropical Baggage was a company because under s 16(7) of the Companies Act 1965 there must be at least two persons to be the directors of the company. In the present case, DW1 said that he was not even a director. Under s 22 of the Companies Act 1965, a limited company

shall have 'Berhad' or 'Bhd' as part of its name and a private company shall have the words 'Sendirian' or 'Sdn' as part of its name. In all the documentary evidence, the defendant used the name 'Syarikat Tropical Baggage' without the words 'Sendirian', 'Sdn', 'Berhad', 'Bhd'. Syarikat Tropical Baggage was, therefore, not a company incorporated under the Companies Act 1965.

The business cannot be said to be a partnership. Section 3(1) of the Partnership Act 1961, defines partnership as follows:

> Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

From the definition, a partnership must have two or more persons.

In my opinion Syarikat Tropical Baggage was a sole proprietorship. Miss Asiriah was right when she said that DW1 was the sole proprietor of Syarikat Tropical Baggage. Since Mr Yeong Sinn Hoong (DW1) was carrying on business in the name or style of Syarikat Tropical Baggage, the plaintiff could sue him in that name or style as if it were the name of the firm. See 30 *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* (2nd Ed) (1979 issue) at p 37. See also *Mallal's Supreme Court Practice* (2nd Ed) at p 1078. In the circumstances, it was proper for the plaintiff to sue Mr Yeong Sinn Hoong in his own name and to add below his name within brackets (trading as, 't/a' Syarikat Tropical Baggage).

I shall now examine whether the defendant was liable for the loss of the said goods. The law applicable to the present case is the Contracts Act 1952. Section 104 of the Act provides that in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods. If he has taken the amount of care described in s 104 then he is not responsible for the loss of the said goods in the absence of any special contract (see s 105). Under the sections, the loss of the said goods entrusted to the defendant is prima facie evidence of negligence. The burden is on the defendant to prove that he was not negligent. See Pollock & Mulla, *Indian Contract and Specific Relief Acts* (10th Ed) at p 786. It is for the defendant to prove that the loss of the said goods was not caused by any fault of his or any of his servants. The onus was also upon the defendant to prove that the loss of the said goods was not caused by the negligence or misconduct of his employees in the course of their employment. See *Port Swettenham Authority* v *TW Wu & Co (M) Sdn Bhd.*[1]

In the present case, it is not in dispute that the plaintiff wrote two letters instructing the defendant not to release the plaintiff's goods without the authorized signatures of the three officers of the plaintiff. The first letter dated 15 December 1981 is reproduced below:

Syarikat Tropical Baggage
No 56 Jalan Kilang Midah
Taman Midah
Kuala Lumpur 20-16.

Dear Sirs

Re: Stocks

This is to inform you that with immediate effect, our goods must not be allowed to leave your warehouse without any counter-signature from our administration manager, Mr Ho Cheng Hong.

Thank you.

Yours faithfully,
for United Engineers (Malaysia) Berhad,

Sgd
Lim Chin Tong
Logistics Executive
Specimen signature of Mr Ho Cheng Hong
Sgd
(Ho Cheng Hong)

cc Mr Ho Cheng Hong

The second letter dated 23 February 1987 is as follows:

Syarikat Tropical Baggage
No 8 Jalan Segambut Atas
Segambut
Kuala Lumpur 12-01.

Dear Sirs

Re: Authorized signatory for releasing UE's stock

Further to our letter to you dated 15 December 1981, please be informed that with immediate effect, Mr Kenny Lim — UE trading manager and Mr Yee Cheon Seng — branch development manager, will be additional authorized signatories in all documents for releasing our goods from your store.

Thank you.

Yours faithfully,
for United Engineers (M) Bhd,

Sgd
Lim Chin Tong
Logistics Executive

1) Specimen signature of Kenny Lim: Sgd ...
2) Specimen signature of Yee Cheon Seng: Sgd ...

cc Mr Ho Cheng Hong
Mr Kenny Lim
Mr Yee Cheon Seng

According to PW1, after the release of the goods stated in P6 from the defendant's warehouse, no other document was issued by the plaintiff for the release of its goods from the defendant's warehouse. DW1, however, said that the defendant released 20 cases of the said goods pursuant to a letter dated 17 March 1988. The letter (P8), which was written on the plaintiff's letterhead, is reproduced below:

Our Ref: Admin/365

Sykt Tropical Baggage & Packing
No 8 Jalan Segambut Atas
Kuala Lumpur.

Dear Sirs

Vehicle Registration No BK-7903 for collection of goods

We would be much appreciated if you could allow bearer of this letter to collect twenty one cases of Condor ELCB.

Thanking you in advance.

We remain,

Yours faithfully,
Sgd
Administration Manager
Ho Cheng Hong

Sgd
UEM Trading Manager
Kenny Lim

DW1 in his evidence said that when the letter (P8) was received by the defendant and upon looking that the logo and the company's name were those of the plaintiff, and upon looking at the word 'bearer' and the vehicle number and the signatories names in the letter, the defendant released the goods in good faith. Before the goods were released, a delivery order was prepared by an employee of the defendant. The delivery order dated 17 March 1982 was addressed to the plaintiff and it contained the description of the said goods. The vehicle registration number SK7903 was also written on the delivery order. According to DW1, the person who received the said goods signed the delivery order and wrote his NRIC number below his signature. DW1 further said, 'We were satisfied until today release of consignment perfectly normal practice.'

Having considered all the evidence in this case, I have come to the conclusion that the defendant or his employee failed to take as much care of the goods bailed to him as a man of ordinary prudence would take of his own goods. Indeed, this was a clear case of negligence on the part of the defendant. I have examined the signatures on P8 and have compared them with the specimen signatures on P4 and P5. Looking at the signatures as a layman, I found that the signatures on P8 were totally different from the specimen signatures on P4 and P5. The defendant or his agent, despite the explicit instructions contained in the plaintiff's letters, P4 and P5, failed to compare the signatures on P8 with the specimen signatures. The defendant merely looked at the letterhead, the registration number of the vehicle and the signatory names. Under cross-examination, Miss Asiriah asked DW1 the question, 'You don't really abide by conditions imposed upon you', and DW1's answer was, 'We look at the signatures also.' The question is whether the defendant ever looked at the signatures. DW1, in his evidence, said that he was not aware of what happened on 17 March 1982. He came to know of the release of the said goods only on 31 March 1982. If his employee, who authorized the release of the said goods, told him that he had a look at the signatures, then this is hearsay and inadmissible. If the person who released the said goods had a look at the signatures on P8 and if he had compared those signatures with the specimen signatures, he would know that the signatures were different. In cross-examination, Miss Asiriah asked him, 'If this letter (P8) presented to you, would you check signature?'. DW1's answer was, 'Yes, I checked with John. He said basing on letterhead and logo. I can't remember if he checked signature.' It is more probable that the person who released the said goods did not examine the signatures on P8.

In the circumstances, the defendant released the said goods without complying with the conditions laid down in the two letters P4 and P5 accordingly. Accordingly the defendant was responsible for the loss of the said goods and liable to make compensation to the plaintiff for such loss. Although it was the defendant's employee who negligently released the said goods, the defendant is liable for the act of his employee. See Pollock & Mulla, *Indian Contract and Specific Relief Acts* (10th Ed) at p 787.

The defendant indeed admitted that the release of the said goods on 17 March 1982 was not authorized by the plaintiff. In a letter written by the defendant's previous solicitors to one Mr Choong Choy alias Chong Hon Keong on 27 January 1983, it is stated, inter alia:

> We act for Syarikat Tropical Baggage. We are informed by our client that on 17 March 1983 a motor vehicle bearing Registration No BK 7903 collected a large consignment of goods from our clients' warehouse at No 8, Jalan Segambut Atas, Segambut Industrial Area, Kuala Lumpur. These goods were not authorized to be collected by its true owners. We would therefore be obliged if you would kindly inform us the person who hired your said motor vehicle bearing Registration No BK 7903 on 17 March 1982.

For the reasons stated above, I give judgment for the plaintiff in the sum of $166,680 with interest at the rate of 12% pa from 17 March 1982 till the date of judgment and thereafter at 8% pa until realization. I also order that the defendant pay the costs of this suit to be taxed by the senior assistant registrar.

Claim allowed.

Solicitors: *Skrine & Co; Bhagwan Singh.*

Reported by *Kevin Mathews*